

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Original Defendant 7 mailing

77-1332

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1332

B
P/S

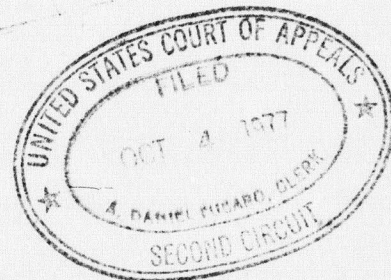
UNITED STATES OF AMERICA,
Cross-Appellant

-against-

JULIENNE BUSIC,
Cross-Appellee

9/29

APPENDIX



DAVID G. TRAGER
United States Attorney
Eastern District of New York

PAGINATION AS IN ORIGINAL COPY

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763251
SCHIRM

United States of America vs.

United States District Court for

DEFENDANT

Eastern District of N.Y.

JULIENNE BUSIC

DOCKET NO. 76 CR 602

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
7 20 1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

David Rudolph

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY. in counts 1, 2 & 3

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-49, U.S.C. Sec. 1472(f) and T-18, U.S.C. Sec. 2, in that on or about Sept. 10 and Sept. 11, 1976, the defendant, with others, by threat of force and violence and with wrongful intent did attempt to and did seize and exercise control of an aircraft bound from LaGuardia Airport, Queens and enroute to O'Hare Airport, Chicago, Ill., the commission of which offense resulted in the death of New York City Police Officer Brian Murray and on or about and between Sept. 6 and Sept. 11, 1976, both dates being approximate and inclusive, the defendant, with others, did knowingly & wilfully conspire to commit air piracy.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

~~life~~ imprisonment on count 1, for a period of 5 years on count 3, both sentences to run concurrently, and pursuant to T-18, U.S.C. Section 4205(b)(1), the Court hereby specifies that the defendant shall become eligible for parole at the expiration of 8 years of imprisonment.

The Court recommends that defendant serve the sentence with co-defendant Zvonko Busic at the Federal Correctional Institution, Terminal Island, California.

SENTENCE
OR
PROBATION
ORDER

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, add at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY *Edwin R. Butcher*
U.S. District Judge

☐ U.S. Magistrate

CERTIFIED AS A TRUE COPY ON

THIS DATE *7/24/77*

BY *[Signature]*
CLERK
DEPUTY

Date July 20th, 1977

OFFENSE MO
MEANOR Mis
FELONY Fel ☒ 2071 0711X

vs. BUSIC, Julianne

(LAST, FIRST, MIDDLE)

602

2

9 21
76
5

BARTELS, J.
76 602 2

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

49:1472 & 18:2
18:371

Aircraft Piracy
Conspiracy

2

1

CLOSED

U.S. MAG
CASE NO 76 M 1822

BAIL - RELEASE

☐ Denied ☐ Bail Not Made ☐ Status Changed (See Docket)

\$1,000,000

Date

☒ Surety Bond

☐ Collateral

☐ 3rd Pny Cust

Other

II. KEY DATES & INTERVALS

SUPERSEDING COUNTS

ARREST or

INDICTMENT ☒

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody Began

High Risk Date

Information

9-21-76

9-27-76

12/6/76

3/23/77

Summons Served

Indict. Waived

1st Plea

Final Plea

1st Plea

Disposition of Charges

First Appearance

In Charging District

Superseding

Indict/Info

Final Plea

1st Plea

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In Charging District

Superseding

Indict/Info

Final Plea

1st Plea

Disposition of Charges

MAGISTRATE		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME:
Search Warrant	Issued			9-13-76	ASC 0703	☐ DISMISSED
	Return					☒ HELD FOR CJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued			9-23-76		☐ HELD FOR CJ OR OTHER PROCEEDING IN DISTRICT BELOW
	Served					
Arrest Warrant issued		9-12-76	HB			
COMPLAINT		9-12-76	HB			
OFFENSE (In Complaint)	T. 49 USC Sections 1472 & 1473 - Aircraft Piracy					

U.S. Attorney or Asst.

ATTORNEYS

Defense: ☐ CJA ☒ Ret: ☐ Waived ☐ Self ☐ None / Other: ☐ PD ☐ CO

Thomas Pattison

David Rudolf, Esq. Michael I. Asen David Rudo
Legal Aid Society 217 Broadway, 200 W 79 S
26 Court St. B'klyn NY N.Y., N.Y. N.Y., N.Y.

* Show last names and suffix numbers of other defendants on same indictment/information.

Z. Busic-1, Matanic-3, Pesut-4, Vlastic-5

EXCLUDABLE DELAY

9-13-76

Defendant arraigned before Judge Chrein on warrant Issued by Judge Bramwell - Order appointing counsel attached.

9-21-76

Indictment returned. Before Catoggio, Mag. Before Bartels, J - case called - deft & counsel present - deft arraigned and enters a plea of not guilty - adjd to Oct. 13 for status report. Interpreter sworn.

9-27-76

10-13-76

Before BARTELS, J - case called - deft & counsel present - case adjd to Nov. 8, 1976 for bail hearing; adjd to 12-1-76 for pre trial motions and adjd to 12-6-76 for trial

10/18/76

Stenographers transcript dated 10/13/76 filed.

10-21-76

Stenographer's Transcript dated 9-27-76 - Filed.

10-26-76

By BARTELS, J - Order filed that all bail and change in venue motions must be served and filed in this court on or before Oct. 27, 1976 at 12 Noon. US Govt must file and serve any papers in opposition on or before Nov. 4, 1976 at 12 Noon and the hearing on the same will be held will be held on Nov. 8, 1976 etc.(see order as indicated)

DATE	DOCUMENT NO.	IV. PROCEEDINGS (continued)	PAGE TWO	EXCLUDABLE DELAY
10-27-76		Notice of Motion for dismissal of the indictment - Filed.		
10/28/76		Notice of motion to dismiss counts one and two for improper venue, and a notice of motion for reduction of bail both returnable 11/8/76 at 9:30 a.m. filed and forwarded to chambers.		
11-5-76		Letter filed dated Nov. 4, 1976 received from Chambers from AUSA Pattison for adjournment to Nov. 8, 1976		
11-5-76		Stenographer's Transcript dated October 28, 1976 - filed.		
11/9/76		Stenographers transcript dated 10/28/76 filed.		
11-9-76		Govts Brief filed in opposition to defts motion to dismiss counts one and two for improper venue		
11-10-76		Notice of motion filed to suppress evidence generated by unlawful surveillance; Notice of motion filed to suppress evidence (documents, luggage) Notice of motion filed for Discovery and Bill of Particulars; Notice of motion filed for severance; Notice of motion filed to dismiss etc. (all forwarded to Chambers)		
11-10-76		Before Bartels, J. - Case Called. Deft. & Counsel present. Interpreter sworn. Motion for an order granting a change of venue argued. - decision reserved. Motion for a reduction of bail argued and denied.		
11-15-76		Affidavit of Thomas R. Pattison - filed.		
11-18-76		Stenographer's Transcript dated November 10, 1976 filed.		
11-19-76		Govts Memorandum filed in opposition to defts motion for severance		
11-19-76		By Bartels, J - Order filed that Special Agents of the F.B.I. obtain samples of hair from the deft at the MCC, NY.		
11-19-76		By Bartels, J - Order filed that AUSA Pattison disclose to all defense counsel any statements of defts in this case provided to any one deft under Rule 16		
11-22-76		By Bartels, J - Order filed denying motion for severance		
11-22-76		Before Bartels, J - Order filed that counts 1 and 2 should be dismissed for lack of venue. Prior to the filing of the order dismissing counts 1 and 2 it is suggested that the Govt notify all defts that a prompt and speedy trial can still be had in the Eastern Dist. of NY on 12-6-76 as originally scheduled.		
11/23/76		Notice of Appeal filed.		
11/23/76		Docket entries and duplicate of Notice of Appeal mailed to the C of A.		
11-24-76		Motion for an order staying until Dec. 13, 1976 the order entered on 11-22-76 dismissing counts 1 and 2. (recvd from Chambers)		
11-24-76		Before Bartels, J - case called - defts & attys present - status report held and concluded - Order of 11-22-76 dismissing counts 1 and 2 is stayed for 10 days to 12-3-76		
DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

CR 602

BUSIC, JULIANNE

4

76

602

2

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11/24/76	(Document No.) By BARTELS, J.- Ordered that the order of 11/22/76 for dismissal of counts one and two of the indictment is stayed until 12/3/76.				
11-29-76	Order received from the Court of Appeals that the record be filed on or before December 22, 1976 filed.				
11-29-76	Stenographers transcript filed dated 11-24-76				
12-6-76	Notice of Motion and Affidavit filed for continuing the stay of the order dismissing counts 1 and 2 of the indictment and staying the trial of count 3 of the indictment. (forwarded to Chambers)				
12-6-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Govt's. motion for a continuance of the stay of order of 11-22-76 until decision of court of appeals is rendered argued and granted. Deft's. motion for reduction of bail argued and denied.				
12-7-76	Stenographers transcript filed dated 12-6-76				
12-8-76	By BARTELS, J - Order filed that the stay of the order dismissing counts 1 and 2 is extending pending determination of the appeal and that the bail is continued and the trial of count 3 is stayed pending appeal.				
12-15-76	Notice of Motion for an Order pursuant to Rule 46 releasing the defendant from custody pending appeal and trial returnable December 20, 1976 at 9:30 A.M. filed and forwarded to Calendar.				
12-16-76	Affidavit of Service filed.				
12-16-76	Affidavit of Thomas R. Pattison filed with Court Exhibits one through four attached.				
12-16-76	Affidavit of Thomas R. Pattison filed.				
12-16-76	Letter written by AUSA Pattison to Judge Bartels to amend certain statements made during oral argument upon the pending venue motion in the case. - filed.				
12-16-76	Letter written by Chief Assistant of the U.S. Attys. addressed to Judge Bartels requesting permission to submit said letter which is written for the purpose of calling attention to an error of law that appears in the memorandum submitted.				
12-20-76	Before BARTELS, J.-Case called-Deft and counsel present-Interpreter sworn-Deft's motion for reduction of bail-Motion Argued-Motion Denied-				
12-20-76	By Bartels, J.- Order filed that the motion to release the deft. from custody pending appeal and trial is under the circumstances denied.				
12/22/76	Letter dated 10/18/76 from AUSSA Pattison setting date for motions filed.				
12/22/76	Govts brief in opposition to defts motion for reduction of bail filed.				
12/22/76	Court Exhibit A filed.				
12/22/76	Letter dated 12/9/76 to Juge Bartesl, form atty for deft, re: order to obtain hair samples on deft., filed.				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

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DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA			
		(a)	(b)	(c)	(d)
12-22-76	(Document No.) Deft's. Notice of Appeal filed.				
12-22-76	Docket entries and duplicate of Notice of appeal mailed to the Court of Appeal.				
12-22-76	Record on Appeal certified and hand delivered to the Court of Appeal by Sara Schownwetter.				
12-27-76	Stenographer's Transcript dated December 20, 1976 filed.				
12-27-76	Acknowledgment received from the Court of Appeal for the record on Appeal filed.				
1-10-77	Supplemental record on appeal certified and mailed to the Court of Appeals.				
1.28.77	Acknowledgment received from the Court of Appeals for the Supplemental Record on Appeal filed.				
1.31.77	Letter filed received from Chambers to Judge Bartels from Michael Asen that the case is on the calendar for status report on 2.2.77 at 3:00 P.M.				
2.2.77	Before Bartels, J.- Case Called. Deft not present. Counsel present. Case adjd. to 2.24.77 for Motions. Case adjd. to 3.14.77 for Trial. Michael Asen & David Rudolph substituted as Counsel.				
2.2.77	Notice of Appearance filed.				
2.2.77	Notice of Appearance filed.				
2.2.77	By Bartels, J.- Order filed that MICHAEL IRA ASEN be substituted as attorney in place and instead of William Gallagher.				
2.3.77	Stenographer's Transcript dated February 2, 1977 filed.				
2-15-77	Copy of letter filed dated 2-11-77 recvd from Chambers to Paul Bergman, Esq. stating case will be on trial 3-14-77				
2/18/77	Memorandum filed to support defts motion to dismiss indictment filed and forwarded to chambers				
2/24/77	Govts memo in opposition to defts motion to suppress statements filed.				
2.24.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft's. motion for discovery and bill of particulars granted and denied as indicated on the record. Deft's. motion to dismiss count (1) on grounds that death penalty provisions is unconstitutional. Motion argued. Decision reserved. Case adjd. to 3.7.77 at 10:00 A.M. for motions on reciprocal discovery, etc. Case adjd. to 3.14.77 for Suppression Hearing, at 10:00 A.M. Case adjd. to 3.22.77 for Trial.				
2-28-77	Stenographers transcript filed dated 2-24-77				
3/1/77	By BARTELS, J - Memo and Order filed that the motion made by deft pursuant to rule 16 (a)(1) (A) is denied.				
3-2-77	Order received from the court of appeals that Judge Bartels Order of Dec. 20, 1976 is hereby affirmed Petition for mandamus is denied.				
3-2-77	Copy of Opinion and Mandate filed received from the c of a that action is hereby remanded to the District court for further proceedings				
3-2-77	By BARTELS, J - Order filed that the deft remain at MCC unless his presence is required in the uS DC, ED NY, and further ordered that no writ or order issued by a judge of any other jurisdiction shall be executed until the trial in this case is over				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

BUSIC, JULIANNE

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Yr.

Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3.2.77	Letter filed dated 3.2.77 Setting case for Trial 3.14.77				
3.4.77	Notice of Readiness for Trial filed.				
3.7.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
3.7.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Motion by Peter Zimrath, Assistant District Attorney, N.Y. County to vacate order of 3.2.77 prohibiting U.S. Marshals from satisfying any writs of habeas corpus from any jurisdiction other than the Eastern District of New York argued and decision reserved. Case adjd. to 3.8.77 at 2:30 P.M.				
3.8.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Ordered that motion of Assistant District Attorney, New York County to vacate order dated 3.2.77 is denied. Motion to dismiss count one of the indictment on basis that Court lacks jurisdiction. Motion argued. Decision reserved. Motion of deft. to dismiss on grounds of undue and prejudicial publicity before the Grand Jury. Motion argued. Motion denied. Case adjd. to 3.15.77 at 10:00 A.M. for Suppression Hearing.				
3-9-77	Stenographers transcript filed dated 3-7-77				
3.10.77	Memorandum of Law concerning Venue as a Jury Issue filed and forwarded to Chambers.				
3/10/77	Letter filed to atty for deft from B. Schulman, re discovery materials.				
3-14-77	Transcript filed dated 3-8-77				
3/15/77	Before BARTELS, J. - Case called. Deft & Counsel present. Hearing ordered and begun. Motion to suppress statement made to FBI and for search of luggage. Hearing ordered and begun. Wade hearing ordered and begun. Hearing adjd to 3/16/77 at 10:00 a.m.				
3/16/77	Before BARTELS, J. - Case called. Deft & Counsel present. Suppression hearings resumed. Wade hearing resumed. Hearing adjd to 3/17/77 at 10:00 a.m.				
3-17-77	Before Bartels, J - case called - deft & atty present - suppression hearing resumed - case adjd to 3-22-77 for status report.				
3-22-77	By BARTELS, J - Memorandum-Decision and Order filed denying suppression motion.				
3-22-77	By BARTELS, J - Memorandum-Decision and Order filed denying motion to dismiss count 1.				
3/22/77	Before BARTELS, J. - Case called Deft & Counsel present. Motion to dismiss count 1 of the indictment on grounds that the grand jury was not properly instructed = denied. Re hearing ordered and begun on motion to suppress search of luggage of deft.				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

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DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA		
	(Document No.)	(a)	(b)	(c)
	Hearing concluded Motion denied Status conference held and concluded. Case adjd to 3/23/77 for trial.			
3-23-77	4 transcripts filed dated Mar. 15, Mar. 16, Mar. 17 and Mar. 22, 1977 respectively.			
3.23.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Jury selection ordered and begun. Jury selection adjd. to 3.23.77.			
3-25-77	Letter filed dated March 24, 1977 received from Asst. U.S. Atty. Korman to Hon. Judge Bartels re letter submitted by the deft. etc.			
3/25/77	Before BARTELS, J- Case called. Deft & Counsel present. Jury selection resumed. Case adjd to 3/28/77 at 10:00 for jury selection. Suppression hearing on search of luggage of deft resumed. Hearing concluded. Decision reserved. Case adjd to 3/28/77 for trial.			
3/28/77	Before BARTELS, J.- Case called. Deft & Counsel present. Jury selection resumed. Jurors selected and sworn. Peter Schlam opens for govts. Michael Asen opens for deft. Case cont. to 3/29/77 at 10:00 a.m. for trial.			
3-29-77	Before Bartels, J - case called - deft & counsel present - Interpreter B. Maruna present - trial resumed - trial contd to 3-30-77.			
3/30/77	Before BARTELS, J.- case called. Deft & Counsel present. Trial resumed. Case adjd to 3/31/77 at 10:00 a.m. for trial.			
3.31.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.5.77 at 10:00 A.M. for Trial.			
4-4-77	transcript filed ordered sealed by Bartels, J. dated 3-4-77			
4-5-77	letter filed forwarded to Chambers dated 4-4-77 from AUSA Korman			
4-5-77	Memorandum filed (deft Busic) 2 letters filed received from Chambers dated Mar. 2. one dated Mar. 11 and one dated Mar. 21, 1977 (retd to Chambers)			
4-5-77	Before Bartels, J - case called - deft & counsel present - trial resumed - adjd to 4-6-77.			
4-6-77	Voucher for compensation for expert services filed forwarded for payment			
4-6-77	Transcript filed pages 2277 to 2297 ordered sealed by Bartels, J			
4-6-77	Before Bartels, J - case called - deft & atty present - trial contd to 4-7-77.			
4/8/77	Before BARTELS, J., - Case called. Deft & Counsel present. Trial resumed. Govt rests. Defts motions for judgment of acquittal motion argued. Motion denied. Case adjd to 4/11/77 at 10:00 for trial.			
continued.....				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

BUSIC, Julianne

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Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
4/11/77	Before BARTELS, J. - Case called. Deft & COUSNEL present. Trial resumed. Trial continued to 4/12/77 at 10:00 a.m.				
4-12-77	Before Bartels, J - case called - trial resumed - Trial contd to 4-13-77				
4-13-77	Before Bartels, J - case called - trial resumed - trial contd to 4-14-77.				
4-14-77	Before Bartels, J - case called - trial resumed - trial contd to 4-18-77/				
4-15-77	Memorandum filed Copy of letter filed from AUSA Korman dated 4-11-77.				
4-15-77	Supplemental record received from the court of appeals acknowledgment mailed to Clerk				
4/18/77	Govts request to charge, and notice of motion for an order dismissing the grounds of gross prosecutorial misconduct etc, filed and forwarded to chambers.				
4.18.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial continued to 4.19.77 at 10:00 A.M.				GP
4.19.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.20.77 at 10:00 A.M. for Trial.				GP
4.20.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.21.77 at 10:00 A.M.				GP
4.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.25.77 at 10:00 A.M.				GP
4/25/77	Before Bartels, J-case called-defts and counsel present. Trial resumed-case adjd to 4/26/77.JLJ				
4.26.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.27.77 at 9:15 A.M. for Trial.				
4-27-77	Deft Zvonko Basic's memorandum in support of instructions Nos. 37, 40, 41, 43, 42 & 66 filed.				GP
4/27/77	Before Bartels, J-case called-defts and counsel present trial resumed-govts rests-case adjd to 4/28/77 for trial.JLJ				
4.28.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's. motion for Judgment of acquittal. Motion argued. Motion denied. Case adjd. to 5.2.77 at 10:00 A.M. for Trial.				
5.2.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up. Order of sustenance signed. Deft's. motion for mistrial - motion denied. Order of Transportation signed. Case adjd. to 5.3.77 at 9:00 A.M. for Trial.				GP
	over.....				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

~~XXXXXXXXXX~~ Julianne Busic

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DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA			
		(a)	(b)	(c)	(d)
5.3.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft. sums up. Govt. sums up on rebuttal. Order of sustenance signed. Judge charges Jury. Alternates discharged. Jury retires at 5:30 P.M. to deliberate. Order of sustenance signed. Jury returns at 7:35 P.M. to have testimony read to them. Orders of Transportation signed. (2) Orders of sustenance signed. Order of Lodging signed. Jury retires for further deliberations. Case adjd. to 5.4.77 at 10:00 A.M. for Trial.				
5.3.77	Before Bartels, J.- Case Called. Hearing in the matter of Henry McGuinness held. Contempt proceedings dismissed.				
5.4.77	By Bartels, J.- Order of Sustenance filed. (BREAKFAST)				
5.4.77	By Bartels, J.- Order of Sustenance filed. (DINNER)				
5.4.77	By Bartels, J.- Order of Transportation filed.				
5.4.77	By Bartels, J.- Order of Lodging filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	Letter filed received from Chambers addressed to Judge Bartels from Pasquale D. Lotesta, M.D. in reference to Henry J. McGuinness' drowsiness during the daytime.				
5.4.77	By Bartels, J.- Order of Transportation filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury deliberations continued. Jury returns to Courtroom at 10:25 A.M. to hear testimony. Order of Sustenance signed. Jury retires at 11:05 A.M. to continue deliberation. Order of sustenance signed. Order of Sustenance signed. Order of Transportation signed. Order of Lodging signed. Jury returns to Courtroom at 9:00 P.M. to hear testimony. Trial continued to 5.5.77 at 10:00 A.M. for Trial.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	By Bartels, J.- Order of Lodging filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed.				
5.4.77	By Bartels, J.- Order of Sustenance filed. (LUNCH)				
5.4.77	By Bartels, J.- Order of Transportation filed.				
5-5-77	Before Bartels, J - case called - deft & atty present - Jury resumes deliberations - Jury returns with a verdict of guilty on counts 1, 2 & 3 - sentence adjd without date. trial concluded - Jury discharged.				
5-5-77	By Bartels, J - 3 Orders of sustenance filed.				
5.9.77	Notice of Motion to Maintain Deft. in Federal Custody filed and forwarded to Chambers.				
5.9.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
5-9-77	2 transcripts filed ordered sealed by the court. (dated Mar. 23 and Mar. 24, 1977 respectively)				

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
5.10.77	By Bartels, J.- Order filed that the Order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.11.77 for 1 day for purpose of appearing in pre-trial proceedings & also ordered that deft. shall remain in continuous custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.11.77 is concluded.				GP
5.10.77	By Bartels, J.- Amended Order filed that the order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.12.77 for 1 day for purpose of appearing in pretrial proceedings & also ordered that deft. shall remain in custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.12.77 is concluded.				GP
5-11-77	2 transcripts filed one dated May 4 and one dated May 5, 1977.				GP
5/18/77	Notice of motion for an order granting a motion to set aside the verdict and enter a judgment of acquittal etc. <i>jlj (Ret. 5/23/77) S-2</i>				
5.19.77	Notice of Motion for an order pursuant to Rules 29, 33, and 34 granting a judgment of acquittal, granting a new trial returnable 5.23.77 at 4:30 P.M. filed and forwarded to Chambers.				GP
5-23-77	Before Bartels, J - case called - deft & atty present - motion to set aside verdict and for judgment of acquittal - motion argued and denied - case adjd to July 20, 1977 for sentence.				
5-25-77	Transcript filed dated May 23, 1977.				
6.1.77	Affidavit of Edward R. Korman filed received from Chambers.				GP
6.1.77	Affidavit of Barry E. Schulman filed received from Chambers.				GP
6.1.77	Memorandum in Support of Motion by the District Attorney, New York County, to vacate the Court's Order of March 2nd, 1977 filed received from Chambers.				GP
6.1.77	Notice of Motion for an order precluding the government from using as evidence (1) the 2-page xerox document etc. filed received from Chambers.				GP
6.1.77	Proposed questions for the Jury Panel filed received from Chambers.				GP
6.1.77	Proposed Voir Dire Questions filed received from Chambers.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 5.8.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael E. Tigar dated 5.10.77 with other material attached.				GP
6.1.77	Letter filed (COPY) received from Chambers addressed to Peter Schlam from Michael E. Tigar dated 2.16.77.				GP

over

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

BUSIC, Julianne

11

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
6.1.77	(Document No.) Letter filed received from Chambers addressed to Michael E. Tigar from Peter R. Schlam dated 3.2.77.				GP
6.1.77	Affidavit in Response to Deft. Busic's Motion concerning Alleged improper use of the Grand Jury filed received from Chambers.				GP
6.1.77	Letter filed (COPY) received from Chambers. addressed to Judge Bartels from Edward R. Korman dated 3.24.77.				GP
6.1.77	Letter filed received from Chambers (COPY) addressed to Judge Bartels from Edward R. Korman dated 3.23.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels, from Edward R. Korman dated 3.25.77.				GP
6.1.77	Unsigned copy of Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.11.77 with other material attached.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.25.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.29.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from David Rudolf and Michael Ira Asen dated 3.8.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 2.28.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 3.18.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from David Rudolf and Michael Ira Asen dated 3.24.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Peter L. Zimroth dated 5.9.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael Ira Asen dated 5.27.77.				GP
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Martin Elefant and Paul B. Bergman dated 5.24.77.				GP
6.3.77	By Bartels, J.- Order of Transportation filed.				GP
6.07.77	Stenographer's Transcript dated May 2nd, 1977 filed.				GP
6.07.77	Stenographer's Transcript dated April 21, 1977 filed.				GP
6.07.77	Stenographer's Transcript dated April 20th, 1977 filed.				GP
6.07.77	Stenographer's Transcript dated May 4th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated April 11th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated April 12th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated April 13th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated April 14th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated April 18th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated April 19th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated March 28th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated March 29th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated March 30th, 1977 filed.				GP
6.10.77	Stenographer's Transcript dated March 31st, 1977 filed.				GP
	over...-....				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

BUSIC, Julianne

12

76
Yr.

602
Docket No.

2
Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
6.10.77	Stenographer's Transcript dated April 5th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 6th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 7th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 25th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 26th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 27th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 28th, 1977 filed.				gp
7-12-77	Notice filed setting case for sentence on 7-20-77				
7-20-77	Before BARTELS, J - case called - deft & atty David Rudolph present - deft sentenced in count 1 to life imprisonment. Deft sentenced in count 3 for a period of 5 years - sentences in counts 1 and 3 to run concurrently and pursuant to T-18, U.S.C.Sec. 4205(b)(1) the deft shall become eligible for parole at the expiration of 8 years. Court recommends that deft serve sentence with co-deft Zvonko Busic at the F.C.I., Terminal Island, California.				
7-20-77	Judgment & commitment filed - certified copies to Marshal.				
7-20-77	Notice of appeal filed - Docket entries and duplicate of notice mailed to the court of appeals.				
7-25-77	Transcript filed dated 7-21-77.				
7.28.77	Memorandum of Law on Behalf of the United States filed received from Chambers..				gp
8/8/77	Scheduling order from C of A that the record be filed on or before 8/10/77.jlj				
8-10-77	Record on appeal certified and handed to Elizabeth De Cristofaro, Sec. to Paul Bergman, for delivery to the court of appeals.				
8-15-77	Acknowledgment filed received from the court of appeals for receipt of record on appeal.				
8-15-77	Judgment & commitment retd and filed - deft. del. to MCC. NY.				
8.19.77	Notice of Appeal filed by the Chief Assistant United States Attorney and forwarded to the Court of Appeals.				gp

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 -----X

5 UNITED STATES OF AMERICA, :

6 -against- :

76-CR-602-1

7 ZVONKO BUSIC a/k/a "Talk" :
8 and JULIENNE EDEN BUSIC, :

9 Defendants. :
10 -----X

11 United States Courthouse
12 Brooklyn, New York

13 July 20, 1977
9:30 o'clock A.M.

14
15 B e f o r e :

16 HONORABLE JOHN R. BRITTS, U.S.D.J.
17
18
19
20
21

22 HARRY RAPAPORT
23 COURT REPORTER
24
25

the Court to conclude that it now did apply.

MR. TIGAR: Well, in that case, your Honor, we submit on the papers with respect to the legal question.

THE COURT: I must say, I must say that I wish Congress had been more specific or explanatory or comprehensive.

MR. TIGAR: I move to wish that offer, your Honor, and I am sure --

THE COURT: Now, if you want to go ahead with legal argument, you have a right to.

MR. TIGAR: No, your Honor. We submit on papers.

THE COURT: The only one who might want to re-argue this is Mr. Norman. He might wish to present his arguments again, which he says I think it wasn't necessary in the first place, in the first place to have this Section 7 indicating it was not applicable to mandatory sentences because the mere fact that you use the word "mandatory" is sufficient; therefore, no significance should be given to the failure of Congress to include that provision in its -- in its 1976 amendment.

Now, Mr. Norman, what do you want? Do you want to argue the law?

MR. NORMAN: If your Honor's mind is made up,

1 a state offense, but also a federal and international
2 offense. The whole country and, indeed, the whole
3 world rises up in outrage and terror when a plane is
4 hijacked.

5 Now, it is important in this case to note that
6 the death of Brian Murray resulted from the air
7 piracy scheme. One cannot forget that he left a widow
8 and family behind. Nor can one forget the serious
9 injuries suffered by the three other officers in the
10 process of deactivating the bomb. Their wives and
11 their families and they themselves have suffered much.
12 One officer had half of his face practically seared
13 off, and another officer was blinded. I mention these
14 facts only in connection with the guilty verdict on
15 count 1, and not in relation to sentences imposed on
16 counts 2 and 3, which are limited to air piracy.

17 It is to be noted that Section 1472(i)(1) of
18 Title 18 of the United States Code provides that in
19 the case of aircraft piracy a defendant shall be
20 punished by imprisonment for not less than twenty
21 years, or if the death of another person results from
22 the commission of the offense, by death or imprison-
23 ment for life.

24 Now, the Government contends that these are
25 mandatory sentences; that Svenko and Julianne Basic

1 face a mandatory life sentence, and that the remaining
2 defendants face a sentence of not less than twenty
3 years, mandatory. The Government also contends these
4 defendants are not eligible for early parole pursuant
5 to Section 4205(b) of Title 18 of the United States
6 Code.

7 The Court has carefully examined the briefs of
8 both the Government and counsel for Zvonko Basic upon
9 the question of the eligibility of the defendants for
10 parole under Section 4205(b) of Title 18 of the United
11 States Code. After due consideration the Court is
12 persuaded that eligibility for early parole is
13 available to the defendants under Section 4205(b) in
14 spite of the fact that the sentences are mandatory.
15 It reaches this conclusion not because it agrees with
16 the decision in United States v. Ortiz, 483 F.2d 175
17 (Ninth Circuit 1973), but because in 1976 upon an
18 amendment to the federal parole law including the
19 repetition of Section 4203(a)(2) as Section 4205(b),
20 Section 7 of Public Law 85-752 was omitted. This
21 section had previously provided that eligibility for
22 early parole under Section 4203(b)(2), 18 U.S. Code,
23 was not available to those who were subject to
24 mandatory penalties such as that provided as punish-
25 ment for aircraft piracy.

1 Now, the failure to include this section in the
2 revised amendment is sufficient the Court believes to
3 authorize its discretion in providing for such early
4 parole. Although the question is not completely free
5 from doubt, this does not mean that the Court is going
6 to exercise that discretion.

7 The Court rejects the other arguments of
8 counsel for Zvonko Basic with respect to early parole
9 eligibility and the constitutionality of mandatory
10 life sentences. Zvonko Basic was the leader and
11 instigator of this horrible tragedy. He deserves the
12 heaviest penalty. The Court will, therefore, not
13 exercise its discretion under Section 4205(b) in
14 favor of Zvonko Basic. However, one of the recognized
15 principles in reaching a sentence is to fit the
16 penalty not only to the crime, but to the criminal.
17 So in the case of Julianne Basic the Court feels, as
18 it has previously indicated, that she was so over-
19 whelmed with love for and dedication to her husband
20 that her common sense was affected and abrogated.
21 Consequently, the Court has decided to exercise its
22 discretion in favor of Julianne Basic under
23 Section 4205(b)(1) by specifying that at the
24 expiration of eight years she shall become eligible
25 for parole.

In both cases the mandatory sentence of life imprisonment will be imposed.

In accordance with the foregoing, the Court hereby formally imposes the following sentences upon Zvonko Busic and Julianne Busic:

They can come up separately.

(continued next page)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

76 Cr. 602 (JRB)

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Defendants.

SENTENCING MEMORANDUM ON BEHALF OF ZVONKO BUSIC

On May 5, 1977, defendant Zvonko Busic was convicted on all three counts in the indictment. Under the terms of 49 U.S.C. § 1472(i)(1)(B), he is subject to life imprisonment for conviction on Count I for aircraft piracy resulting in death.^{1/} The defendant is also subject to a maximum five-year sentence and/or \$10,000 fine for conviction of conspiracy under Count III.^{2/} This sentencing memorandum is submitted on behalf of Zvonko Busic.

We respectfully request that Zvonko Busic be sentenced pursuant to the early parole eligibility provisions of 18 U.S.C. § 4205(b). We also request that the Court recommend to the United States Bureau of Prisons that the defendants Zvonko Busic and Julianne Busic be committed together to a co-correctional facility in the federal prison system. Finally, we submit that a mandatory minimum life sentence is unconstitutional.

^{1/} In a prior appearance before the Court, government counsel conceded that the conviction on Count II for aircraft piracy should be merged into Count I and that no separate punishment was appropriate.

^{2/} We urge the Court to make any sentence on Count III concurrent with the sentence on Count I.

I.

THE DEFENDANTS ARE ELIGIBLE FOR EARLY
PAROLE UNDER 18 U.S.C. § 4205(b).

The Court has available as a sentencing option the early parole eligibility provisions of 18 U.S.C. § 4205(b):

"Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine." ^{3/}

The question arises whether, because of the nature of the life sentences to be imposed on defendants Zvonko Busic and ~~the~~ Julienne Busic and the sentences of at least 20 years to be imposed on defendants Petar Matanic and Frane Pesut, the defendants are entitled to the sentencing alternatives under § 4205(b). The answer is emphatically in the affirmative.

A. In Light Of The Absence Of Any Statutory Parole Ineligibility Provisions For Defendants Convicted Of Aircraft Piracy, The Defendants Are Eligible For Early Parole.

When 18 U.S.C. § 4208(a) -- the predecessor of § 4205(b) ^{4/} -- was enacted in 1958 as an amendment to Chapter 311 (Parole) of Title 18, Congress provided that "[t]his Act does

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^{3/} Under the Parole Commission and Reorganization Act of 1976, § 4205(b) is a recodification without any change of former 18 U.S.C. § 4208(a). Pub. L. No. 94-233, 90 Stat. 222, § 2, March 15, 1976.

^{4/} See note 3, supra.

not apply to any offense for which there is provided a mandatory penalty." Pub. L. No. 85-752, 72 Stat. 847, § 7, August 25, 1958. As the discussion below indicates, the sentences to be imposed under 49 U.S.C. § 1472(i)(1) for conviction of aircraft piracy cannot be construed to be mandatory penalties under § 7 of Pub. L. No. 85-752. In any event, all of former Chapter 311 of Title 18, including § 7 of Pub. L. No. 85-752, was repealed by the new federal parole legislation.

Under the Parole Commission and Reorganization Act of 1976, Congress explicitly repealed Chapter 311 in its entirety. Section 2 of Pub. L. No. 94-233 provides:

"Title 18 of the United States Code is amended by repealing chapter 311 (relating to parole) and inserting in lieu thereof the following new chapter to read as follows:". 90 Stat. 219.

Nowhere in new Chapter 311 does Congress incorporate former § 7 of Pub. L. No. 85-752 or any similar language disqualifying certain classes of offenders from the early parole eligibility provisions.

The plain words of the statute make the defendants eligible for the benefits of new § 4205(b).

Section 4205(a) provides that "a prisoner shall be eligible for release on parole after serving one-third of such term of terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law." (Emphasis added.) In the very next subsection (b) of § 4205, Congress provides for early parole ineligibility. If Congress had wanted to exempt defendants serving mandatory life sentences from § 4205(b), it clearly would have done so. On the contrary, the only special treatment that is given to life sentences is a reduction from 15 to 10 years of the time before which a defendant not given the opportunity for

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early parole eligibility may be considered for parole. This evident congressional attempt to minimize the harshness of life sentences dispels any notion that in the very same legislation Congress sought to bar offenders with life sentences from the possibility of early parole consideration.

In specifying the parole eligibility of long-term offenders, § 4206(d) states in pertinent part:

"Any prisoner, serving a sentence of five years or longer, who is not earlier released on parole under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms more than forty-five years including any life term, whichever is earlier"

The quoted portion of § 4206(d) belies any suggestion that there is an automatic early parole ineligibility for defendants serving life sentences. Congress clearly contemplated that some long-term offenders would be released prior to completion of one-third of their sentences. Otherwise, the "not earlier released on parole" language is robbed of any meaning.

By the terms of § 4205(g), the Director of the Bureau of Prisons is authorized to request that "the court . . . reduce any minimum [parole] term to the time the defendant has served." The creation of this power without any express provisions exempting certain types of offenses or long-term sentences strongly suggests that Congress did not envision that long-term offenders, including those with life sentences, would be ineligible for early parole consideration.

Finally, in the definition of "eligible prisoner", § 4201(4) speaks of "any Federal prisoner who is eligible for parole pursuant to this title or any other law"

Even if there were some ambiguity about the repeal of the former disabling language, any doubts must be resolved in

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favor of the criminal defendant. United States v. Bass, 404 U.S. 336, 347-49 (1971). This rule is particularly applicable in the context of parole eligibility. Parole is a creature of statute. As such only Congress can confer its benefits on, or withhold them from, certain classes of offenders. When Congress chooses to withdraw parole eligibility, it speaks clearly and in explicit terms.

Moreover, in light of the serious adverse consequences flowing from the denial of parole eligibility, it is essential that any such congressional intention be explicit and unequivocal.

"For the confined prisoner, parole -- even with its legal restraints -- is a long step toward regaining lost freedom. An observation made in a somewhat different context is apt:

"It may be 'legislative grace' for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offenses, . . . this is in the nature of an additional penalty." Durant v. United States, 410 F.2d 639, 691 (CA 5 1969)."

Warden v. Marrero, 417 U.S. 653, 663 (1974) (Footnote omitted).

In Warden v. Marrero, supra, the Supreme Court held that, in passing the Comprehensive Drug Abuse Prevention and Control Act of 1970 and that portion repealing former law making some types of narcotics offenders ineligible for parole, Congress had not intended to restore parole eligibility to certain other classes of narcotics offenders. Specifically, the Court ruled that, in repealing 26 U.S.C. § 7237(d), Congress had intended by the general saving clause^{3/} to make parole ineligibility in § 7237(d) a part of the punishment and therefore subject to the

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^{3/} 1 U.S.C. § 109.

"penalty, forfeiture, or liability" terms of the saving clause. In so ruling, the Court stressed that "Congress expressly provided in § 7237(d) that parole under 18 U.S.C. § 4202 would be unavailable for narcotics offenders." 47 U.S. at 392 (emphasis added).

The aircraft piracy legislation -- from the very first enactment of criminal penalties in 1961^{6/} -- has never contained any express provision making offenders ineligible for parole either for any specified time period or for the full term of imprisonment. Nor is there anything in the legislative history to support this conclusion. Indeed, the legislative history of the 1961 criminal provisions explicitly emphasizes that all features of federal parole laws shall be available to hijackers. The Report of the House Committee on Interstate and Foreign Commerce states:

"If the death penalty is not imposed, the punishment imposed by the court shall be imprisonment for not less than 20 years.

Under other provisions of law contained in chapter 311 of title 18 of the United States Code, relating to parole of Federal prisoners, an individual sentenced to imprisonment for life or for any term of years in excess of 45 becomes eligible for parole after serving 15 years of the sentence imposed. An individual sentenced to a lesser term of years

6/ Pub. L. No. 87-197, 75 Stat. 466, Sept. 5, 1961. The 1974 amendments to the criminal penalties portion of the statute dealt only with the revisions necessary in the capital punishment procedures in the wake of *Furman v. Georgia*, 403 U.S. 238 (1972). See H.R. Rep. No. 93-385, 93d Cong. 2d Sess. (1974), reprinted in [1974] U.S. Code, Cong. & Admin. News 3975, 3977-83; H.R. Rep. No. 93-1194, 93d Cong. 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Admin. News 3996, 3998-1000. Congress also altered the penalty scheme to provide for a life sentence if the court or jury decided against capital punishment for an air piracy resulting in death and to provide for a minimum 20-year sentence for air piracy. These penalty modifications, however, did not include the addition of any parole ineligibility provisions.

becomes eligible for parole after serving one-third of the sentence imposed. The Federal courts are also given discretion, in the case of sentences to imprisonment for more than 1 year, to specify a minimum term of imprisonment after which a Federal prisoner may be eligible for parole. This minimum term may be less than one-third of the sentence imposed, but may not exceed one-third of such sentence.

"In view of the discretion vested in the Federal courts in connection with the sentencing of individuals convicted of Federal crimes, under the various provisions of law relating to parole, probation, and young adult offenders, the committee is of the opinion that there is ample discretion vested in the courts to make the punishment fit the seriousness of the crime." H.R. No. 958, 87th Cong. 1st Sess. (1961), re-printed in (1961) U.S. Code, Cong. & Admin. News 2563, 2568.

B. When If Section 7 of Pub. L. No. 85-752 as Not Been Repealed, Punishment For Aircraft Piracy Is Not A "Mandatory Penalty" Under Section 7.

Defendants recognize that 49 U.S.C. § 1472(i)(1) requires the Court to sentence the Zvonko Basic and Julianne Basic to life imprisonment and Petar Matanic and Frane Pesut to at least 20 years imprisonment. To this extent, these sentences required by statute could be considered to be mandatory. However, the inquiry does not end here. For purposes of the disqualifying effect of § 7 of Pub. L. No. 85-752, the term "mandatory penalty" has a special meaning and significance quite different from the punishments prescribed for aircraft piracy.

The issue of the applicability of § 7 to the aircraft piracy statute has been conclusively resolved. In the only reported decision on the question, the United States Court of Appeals for the Ninth Circuit held that 49 U.S.C. § 1472(i) does not prescribe a "mandatory penalty" as that term is understood in the context of § 7. In United States v. Ortiz, 482 F.2d 175

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(9th Cir. 1973), the Ninth Circuit vacated the sentence of a hijacker because the trial judge had erroneously concluded that he lacked discretion to sentence pursuant to former 18 U.S.C. § 4208(a). The Court's reasoning is dispositive and therefore bears quoting in full.

"The trial judge rejected sentencing Chavez pursuant to the special parole provisions of 18 U.S.C. § 4208(a), stating he did not believe it applied to the air piracy statute. We disagree. Since the parole provisions of section 4208 are not applicable to any offense for which there is provided a mandatory penalty, 18 U.S.C.A. § 4208 Note (originally appears as Act of Aug. 25, 1958, Pub. L. No. 85-752, § 3 [stat], 72 Stat. 845), the determinative question is whether 49 U.S.C. § 1472 requires a mandatory penalty. We have found no case so holding.

"In Jones v. United States, 419 F.2d 593, 594 (8th Cir. 1969), Judge (now Mr. Justice) Blackmun articulated the same issue which now confronts us:

"We are concerned here with the meaning of the words 'mandatory penalty' as employed in a federal criminal statute. Do these words relate to a prison term of fixed or minimum length, as contrasted with the common 'not more than * * * years', or, on the other hand, do they relate to a prison term which must be served and as to which postconviction benefits of suspension of sentence, probation, and parole are specifically denied?"

"He concluded that a 'mandatory penalty [is] a sentence which must be served devoid of the benefits of suspension, probation, and parole. Illustrative of this are the sentences for the narcotic offenses' 419 F.2d at 599.

"The government argues that Chavez is not entitled to section 4208 benefits, citing our decisions in which we have held that section 4208 was inapplicable to the mandatory narcotics penalties of 26 U.S.C. § 7237(d). See, e.g., O'Neal v. United States, 332 F.2d 152 (9th Cir. 1964). However, the O'Neal line of cases are inapplicable to the skyjacking statute. O'Neal involved 26 U.S.C. § 7237(d) which was replaced by the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. §§ 801, 841 et seq. (criminal offenses); 1970 U.S. Code Cong. and Admin. News 4566, 4567.

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A careful analysis of the difference between the laws involved demonstrates that the narcotics statute involved in O'Neal provided for a mandatory penalty while the skyjacking statute does not. Title 26 U.S.C. § 7237(d) provided that upon the conviction for a narcotic offense "the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18 [parole provisions] . . . shall not apply." The section 7237(d) penalty was clearly mandatory and had to be served. The offender was foreclosed from all relief by way of suspension of sentence, probation, or parole.

"On the other hand, the skyjacking penalty contains no such prohibitions upon probation or parole. Moreover, we believe the legislative history shows that Congress intended section 4208 to be applicable to a sentence imposed for skyjacking.

"We conclude that 49 U.S.C. § 1472(i) (specifying the punishment for aircraft piracy) does not provide for a mandatory penalty and, therefore, the trial judge has the discretion to sentence pursuant to section 4208. As the sentencing judge did not believe he had such discretion, we remand the case for further consideration of the sentence consistent with this opinion." 483 F.2d at 178-79 (footnote omitted). 7/

II.

IN VIEW OF THEIR LONG-TERM PRISON SENTENCES, THE DEFENDANTS SHOULD BE SENTENCED PURSUANT TO 18 U.S.C. § 4205(b).

The defendants request that the Court specify that their sentences are imposed pursuant to 18 U.S.C. § 4205(b)(2). By making the defendants eligible for parole at whatever time the Parole Commission determines is consistent with the statutory standards for parole release, the Court would be acting in conformity with the legislative intent in enacting § 4205(b)(2).

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7/ In the omitted footnote, the Court quoted the excerpt from the 1961 Report of the House Committee on Interstate and Foreign Commerce set forth earlier in the text of this Sentencing Memorandum.

An indeterminate sentence with open-ended parole eligibility -- particularly in cases involving exceptionally long prison terms -- is an essential feature of the overall federal correctional scheme.

The Second Circuit has spoken definitively about the purpose of § 4205(b)(2) in the context of litigation involving its identical statutory predecessor, § 4208(a)(2).

"Prior to the enactment of 18 U.S.C. § 4208 in 1958, eligibility of federal adult prisoners for parole was governed solely by 18 U.S.C. § 4202. Neither the sentencing judge nor the Parole Board had any authority to permit release on parole until the expiration of one-third of the sentence.

"Section 4208 introduced the concept of the indeterminate sentence into federal sentencing and parole procedure. Under Section 4208(a), the sentencing judge and the Parole Board were no longer bound by the restriction on parole eligibility prescribed by Section 4202. The sentencing judge, after fixing a maximum sentence, could either fix a minimum term at the expiration of which the prisoner would become eligible for parole (4208(a)(1)), or specify that the prisoner would be eligible for parole at any time (4208(a)(2)). The Parole Board was empowered to grant parole whenever it determined that the prisoner was suitable for release, after the expiration of the minimum sentence under (a)(1) or at any time under (a)(2).

"As the Seventh Circuit pointed out in Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974):

"A major purpose of any indeterminate sentence provision is to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community. By keeping the minimum low, the prisoner is encouraged "to earn favorable consideration for parole in accord with the public policy embodied in the parole statutes." National Council on Crime and Delinquency, Guides for Sentencing 21 (1963). An additional purpose of indeterminate sentencing is to provide a mechanism for reducing disparity of sentences given by different

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judges. Both of these goals have long been stressed by commentators and advocates of modified indeterminate sentencing plans for the federal courts." [Citations omitted]

"Congress plainly had these purposes in mind when it enacted Section 4208, and particularly Section 4208(a)(2). There is no need to review in detail here the legislative history of the bill, which is reviewed and documented in Garafola, supra, at 1217-1218, and in Grasso I, at 173-174. It is of particular note, however, that Congressman Emanuel Celler, then Chairman of the House Judiciary Committee and author of the bill, recognized that Section 4202 created 'a purely arbitrary limitation which does not take into consideration the varying responses which individual prisoners made to the rehabilitation program carried on in our Federal penal and correctional institutions.' Congressman Celler pointed out that Section 4208 would 'permit the release under supervision at an earlier date, should a prisoner's response to the rehabilitation justify it.' Hearings on H.J.Res. 424, H.J.Res. 425 and H.R. 3923 before Subcommittee No. 3, House Committee on the Judiciary, 85th Cong., 2d Sess., at 5, 6 (1958). Deputy Attorney General Lawrence E. Walsh, speaking for the Department of Justice in support of the bill, explained that 'the purpose of this bill is to impose on a defendant a sentence with a broad enough range between the minimum and the maximum so that the people who work with him from day to day in the prison can see his progress and pick that moment when he is best suited to go back to the community and take an active part.' Hearings on H.J. Res. 424, H.J.Res. 425 and H.R. 3923 before Subcommittee No. 3, House Committee on the Judiciary, 85th Cong., 2d Sess., at 3 (1958)."
Grasso v. Norton, 520 F.2d 27, 32 (2d Cir. 1975) (footnote omitted).

Without even the possibility of early parole eligibility, the defendants will be required to spend considerable lengths of time in confinement before they could appear for a parole release hearing.^{8/} In the case of Matanic and Pesut, they

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^{8/} In light of the circumstances surrounding this case, it is idle to think that the defendants will be released into the

(Footnote continued)

would be confined at least six and two-thirds years if they received the minimum 20-year sentence. The Busics would be incarcerated at least ten years on their life sentences. See 19 U.S.C. § 4205(a). One of the primary advantages of the § 4205(b)(2) sentencing alternative "is to provide the sentencing judge with the option of allowing the Parole [Commission] to release the prisoner on parole at any time before the one-third point if in its judgment events after the date of sentencing warrant early release." Garafola v. Benson, *supra*, 505 F.2d at 1216 (emphasis added). As the Second Circuit has observed, the sentencing judge's imposition of a § 4205(b)(2) sentence

"beside relieving a defendant from restrictions placed on eligibility for parole by [§ 4205(a)], is an expression of the court's expectations . . . that institutional performance and response to rehabilitative programs will be given due effect by the Parole [Commission] in determining whether parole should be granted." Grasso v. Norton, *supra*, 520 F.2d at 32.

(Footnote continued)

3/ community within the first few years of confinement. There is no need to speculate about the likely minimum period of confinement before any serious prospect of a meaningful hearing. Under the Parole Commission's system of parole release guidelines, none of these defendants would be presumptively eligible for release for a period far in excess of at least three years. See 28 C.P.R. § 2.20 (1977); see generally P. O'Donnell, M. Churgin, and D. Curtis, Toward A Just and Effective Sentencing System: Agenda For Legislative Reform 13-19, 21-30 (Praeger, 1977).

This estimate is necessarily imprecise. Under the guidelines for paroling adult offenders, the offense of aircraft hijacking is graded as the "greatest" in severity. There are no suggested time periods for incarceration for this offense. The next least serious category of offenses ("very high") require a minimum of about three years of confinement for inmates with the very best backgrounds in terms of prior convictions and incarcerations and the like. It is fair to conclude that an offense of the severity of aircraft piracy would carry a presumptive time period of incarceration of considerably longer than three years.

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A straight sentence under § 4205(a), precluding parole consideration until one-third of the sentence has been served, would seriously jeopardize institutional rehabilitation and treatment programs. In Grasso and Garafola, the Second and Seventh Circuits canvassed the most respected judicial authorities on the value of a sentence with open-ended parole eligibility. See 505 F.2d at 1213. Every one of them concluded that, while a so-called "(b)(2)" sentence "does not per se indicate early parole", it "supplies flexibility to program the individual in prison and to grant parole based on his adjustment and readiness for release." W. Hoffman, "Purposes and Philosophy of Sentencing", Seminars for Newly Appointed United States District Judges" 286, 307 (1971). Judge Devitt offered this conclusion.

"When will [an inmate] have received the maximum benefits of confinement? We judges don't know the answer to that crucial question, and bountifully as we may be blessed with wisdom, we are not possessed of the prescience to foretell it.

"By the use of this new statute, we can delegate to the Parole [Commission] the authority to wisely fix the terminus of the sentence on the basis of the prisoner's progress in rehabilitation and his attitudes toward a return to society." E. Devitt, The Desk Book for Sentencing, p. IV-30 to 31.

In the Appendix to this Sentencing Memorandum, we have delivered 19 letters to the Court in support of Zvonko Basic. The picture that emerges from these testimonials is not that of a hopeless human being who should be forever banished from society. On the contrary, these letters coincide with Dr. Bernard Diamond's conclusions:

"Taking into consideration his lifelong social and cultural indoctrination, the social and political circumstances of his childhood, his total preoccupation with the salvation of the Creative Force, the belief in the reality threat to his own life, and his obsessive determination to perform one last act of value to his people, it seems clear to me that he

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lacked any mental ability to make a choice or decision to do other than what he did do

"He did what he did out of psychological necessity, not free choice." Deposition of Dr. Bernard Diamond, taken April 12, 1977, at 20-21 (reproduced in the Appendix).

Dr. Diamond's un rebutted conclusions, coupled with the defendant's own testimony at trial, show that the defendant did not intend to hurt anyone when he placed the explosive device in the Grand Central Station locker. Because of the magnitude of his error, he will be incarcerated for a considerable period. The exact length of his confinement, however, should be based on the expert judgment of correctional authorities after ample opportunity to study, counsel and work with the defendant.

As a modern civilized society, we have come to cherish our commitment to individualized justice and our faith in rehabilitation as a principal purpose of punishment.

"[A] prevalent modern philosophy of penology [holds] that the punishment should fit the offender and not merely the crime. . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions -- even for offenses today deemed trivial. Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by nonjudicial agencies have to a large extent taken the place of the old rigidly fixed punishments. . . . Execution of the United States parole system rests on the discretion of an administrative parole board. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." Williams v. New York, 337 U.S. 241, 249 (1949) (citations omitted).

Experience, as well as the facts of this case, suggest that the most appropriate type of sentence in this case is

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one permitting open-ended parole eligibility under 18 U.S.C. § 4205(b)(2). In this manner, the nature and characteristics of the offender and the circumstances of the offense, in combination with the defendant's institutional adjustment and performance record, can be carefully evaluated by the prison and parole authorities in making the sensitive parole release decision.

III.

THE COURT SHOULD RECOMMEND THAT ZVONKO AND JULIENNE BUSIC BE CONFINED IN THE SAME INSTITUTION.

The Court has the discretion to recommend the Bureau of Prisons institution for which a defendant will be designated. On the basis of counsel's discussions with Mr. Tony Talak, Director of Designations, we know that the sentencing judge's recommendation is given serious consideration by the Bureau of Prisons. Whenever possible, the Bureau of Prisons will honor a judge's request. Zvonko and Julianne Busic respectfully request that the Court recommend that they be committed together in the same penal institution.

The Bureau of Prisons maintains four so-called "co-correctional institutions": (1) Ft. Worth, Texas; (2) Lexington, Kentucky; (3) Pleasanton, California; and (4) Terminal Island, California. The first two institutions are minimum security; the third is a youth and young adult facility; and the fourth is a medium security institution. In discussions with Mr. Talak and others, we have learned that with a limited number of available positions in co-correctional facilities, the sentencing judge's recommendation carries exceptional weight.^{9/}

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^{9/} The importance of the Court's recommendation cannot be overemphasized. Even if the Bureau of Prisons could not

(Footnote continued)

The defendants have been convicted of serious offenses and face lengthy prison terms. However, they are not automatically disqualified from being committed to the same institution. Their educational backgrounds, intelligence and exemplary institutional records over the past ten months attest to the fact that they will not pose a problem to correctional officials. Counsel have been assured that their cases will receive careful, ongoing consideration by the Bureau of Prisons.

There is a human element here which we are confident the Court will weigh heavily in its deliberations. Julianne and Zvonko Busic have been married for over five years. Despite great adversity and hardship during their marriage, they have remained loyal to one another. Throughout the ordeal of their incarceration and trial, they have grown even closer. In her letter to the Court on behalf of her husband, Julianne Busic describes their relationship and desire to remain together:

"My husband is not an inscrutable, shrouded figure with a heart of stone. He is a sensitive, funny and compassionate man who is always the first to help others, to give what he has to others in need and to offer advice to anyone in trouble. . . .

"I sincerely hope that your Honor will believe me when I say that Zvonko is the most highly-principled person I have ever known, respected and admired by all who know him, and an example for others in his community. He is my best friend, my husband, confidant, and adviser in all problems, large and small We have hoped for a family for a long time, and I hope that we will someday still have that chance

(Footnote continued)

9/ immediately place the defendants in the same institution, it is likely that space will become available in the future. Counsel are informed that the presence of the sentencing judge's recommendation in an inmate's prison file can be determinative in such matters.

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I have never been separated from my husband, and I am very despondent over an eventual separation. If we could at least have a recommendation from you to be designated together, I'm told by the Warden that it would help tremendously in making this request possible."

The Court has an opportunity to help these defendants to take a small step in what will undoubtedly be a long and painful journey. With this sign of compassion, the Court will give the defendants cause not to abandon hope. And with this gesture of decency, the Court will give added meaning to the concept of justice tempered by mercy.

IV.

TO THE EXTENT THAT LIFE PRISON
SENTENCES ARE MANDATORY, 49 U.S.C.
§ 1472(i)(1) IS UNCONSTITUTIONAL

Under 49 U.S.C. § 1472(i)(1), the Court has no discretion to tailor the punishment to the severity of the defendant's conduct and the characteristics of the defendant. The sanction of life imprisonment is automatic and admits of no exception. We respectfully urge the Court to declare this portion of the statute unconstitutional in violation of the Fifth and Eighth Amendments.

We candidly acknowledge that from the earliest days of American jurisprudence, legislatures were considered to have unfettered and unreviewable discretion in determining the appropriate punishment for an offense. Traditional constitutional constraints of fairness and rationality were thought to have no bearing on these matters. This laissez-faire judicial approach to sentencing, however, is fast changing.

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In its historic ruling last term in Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court held that mandatory death penalties are unconstitutional. The Court^{10/} outlined several of the significant constitutional developments over the past few decades that support our contention that a mandatory life sentence under the circumstances of this case is unconstitutional.

"The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.' Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion). See id., at 101; Weems v. United States, 217 U.S. 349, 373, 378 (1910); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463-469 (1947) (Frankfurter, J., concurring); Robinson v. California, 370 U.S. 660, 666 (1962); Furman v. Georgia, 408 U.S. at 242 (Douglas, J., concurring); id., at 269-270 (Brennan, J., concurring); id., at 329 (Marshall, J., concurring); id., at 382-383 (Burger, C. J., dissenting); id., at 409 (Blackmun, J., dissenting); id. at 423-429 (Powell, J., dissenting). Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. . . .

Fifty years after Winston [v. United States], 172 U.S. 303 (1899), the Court underscored the marked transformation in our attitudes towards mandatory sentences: 'The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . .' Williams v. New York, 337 U.S. 241, 247 (1949).

^{10/} The plurality opinion was jointly authored by Justices Stewart, Powell and Stevens. Justices Brennan and Marshall concurred in the judgment that the mandatory capital sanction was unconstitutional. The excerpts from Woodson quoted *infra* are taken from the plurality opinion. In light of Justices Brennan and Marshall's views that capital punishment is *per se* unconstitutional and their earlier opinions on the subject, it is fair to conclude that they ascribe to the principles excerpted from Woodson.

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It is now well established that the Eighth Amendment draws much of its meaning from the 'evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S., at 101 (plurality opinion). . . .

* * *

A process that accords no significance to relevant facets of the character and record of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, *supra*, 428 U.S. at 288, 296-97, 301, 304 (Footnote omitted).

Mandatory life sentences are increasingly under attack.

On the basis of a three-year study of sentencing policies at the Yale Law School involving a distinguished panel of federal judges, wardens, probation and parole officials, and Department of Justice representatives, the study group concluded:

"We have expressed our opposition to mandatory minimum sentences. We endorse the concept of swift and certain punishment and uniform sentencing practices We find unwise, however, any sentencing statute that purports to squeeze all discretion out of the system. The price is too high for the speculative benefits gained from such inflexible laws. As Judge Marvin E. Frankel remarked:

'Unless the power to discriminate is left somewhere, the criminal law tends to produce monstrosities. There is a need for cleaner, more uniform, more humane standards, but there will remain always a need for judgment.'"

P. O'Donnell, M. Churgin and D. Curtis, Toward A Just and Effective Sentencing System: Agenda for Legislative Reform 90-91 (Praeger, 1977).

Federal correctional officials are likewise adamantly opposed to mandatory minimum sentences. In recent testimony on proposed federal sentencing legislation before the Senate

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Judiciary Committee's Subcommittee on Criminal Laws and Procedures, the highly-regarded Director of the Bureau of Prisons, Norman A. Carlson stated:

"Section 1311, Trafficking in an Opiate, and Section 1321, Using a Weapon in the Course of a crime, both provide for mandatory minimum imprisonment penalties . . . which the court will impose upon conviction. We are generally opposed to the use of mandatory minimum sentences for any specific criminal offense. Although the statutes exempt application of the mandatory penalty for certain specific mitigating circumstances such as youth (under 18) or mental impairment, mandatory minimums unnecessarily restrict the flexibility, in terms of sentencing options, which a judge needs . . . [T]he Committee may recall that Congressional action was recently required to relieve the inequities caused by minimum mandatory penalty provisions in the Harrison Narcotics Act." Testimony of Norman A. Carlson, June 8, 1977, at 4-5.

The deterrent value of mandatory minimum sentences has been cited as a primary justification for such harsh sanctions. The record, however, does not support this mechanical sentencing approach. Empirical research is increasingly showing that no appreciable amount of deterrence is gained by mandatory sentences. For example, a study sponsored by the Law Enforcement Assistance Administration concluded that New York State's celebrated severe mandatory penalties for narcotics offenses did not prove a deterrent. See The Association of the Bar of New York-Drug Abuse Council, The Effect of the 1973 Drug Laws on New York State Courts (Interim Report, August 1976).

In this case, the mandatory life sentences for aircraft piracy are particularly cruel and unfair in three respects.

First, the harshness of the penalty is underscored by the fact that the offense of aircraft piracy resulting in death

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has no degrees. ^{11/}

Second, under the Court's interpretation of the statute, the standard for liability permits a defendant with no participation in the construction of the explosive device or placement of the death-inducing instrument to be held liable ^{12/} for the offense of aircraft piracy resulting in death.

Third, the statute does not allow the Court to take into consideration the intent or mental condition of the defendant ^{13/} -- two mitigating factors that traditionally play an important role in sentencing. In its recent decision invalidating mandatory death penalties for the murder of a police officer, the Supreme Court stressed the importance of mitigating factors in making a sentence determination -- even in a case with the aggravating circumstance of the death of a peace officer.

^{11/} In addition, the Court ruled during trial that the statute has no lesser included offense which could be considered by the jury in its deliberations.

^{12/} The Court instructed the jury that a defendant could be convicted for aircraft piracy resulting in death if they found beyond a reasonable doubt that he or she was an aider and abettor who joined in the hijacking scheme and should have foreseen that a live bomb would be utilized. Instruction on Causation at 23. A defendant could be convicted on Count One and subject to a mandatory life sentence despite the fact that he or she lacked actual knowledge that the hijacking would involve the risk of death by means of a live bomb on the ground. Under familiar tort principles, this liability is founded on negligence.

^{13/} The Court rejected the defendant's attempt to raise under Rule 12.2(b) of the Federal Rules of Criminal Procedure the defense of mental condition precluding the mental state required for the offense. The Court also instructed the jury that a defendant could be convicted for aircraft piracy resulting in death, notwithstanding the fact that that death of another person was not intended. Instruction on Causation at 25.

At the very least the Court should be permitted to take these mitigating factors into consideration in imposing punishment. The mandatory life sentence under the statute, however, forbids any such conscientious exercise of discretion.

"[I]t is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and are considered relevant in other jurisdictions." Roberts v. Louisiana, 45 U.S.L.W. 4584, 4585 (U.S., June 6, 1977).

The mandatory life sentence under the federal aircraft piracy statute offends civilized notions of decency, fairness and proportionality. We therefore respectfully request that the Court declare the penalty provision of the statute unconstitutional and impose sentence free of this arbitrary constraint.

Respectfully submitted,

Michael E. Tigar

Pierce O'Donnell

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5085

Attorneys for Zvonko Basic

Of Counsel:

Edward Bennett Williams

Dated: Washington, D.C.
July 14, 1977

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D.C. 20006

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UNITED STATES ATTORNEY

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July 18, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic, et al.
Docket No. 76 CR 602

Dear Judge Bartels:

The defendants Zvonko Busic and Julianne Busic stand convicted of one of the most serious offenses defined in the United States Code, aircraft piracy resulting in the needless death of a brave young New York City Police Officer. The remaining defendants, without whose participation this crime might never have taken place, stand convicted of simple air piracy which risked the lives of dozens of innocent passengers. They each asked to be sentenced to a term of imprisonment which would permit the Board of Parole to set them free on the day after sentence.

Normally, we do not take a position on what sentence should be imposed where, as here, the seriousness of the offense is apparent both from the evidence at trial and from the manner in which Congress treated it. We depart from that practice here only to the extent of opposing early parole eligibility for any of these defendants. Both as a matter of law, as detailed in the accompanying memorandum, and as a matter of policy, we believe that a sentence which includes a provision for early parole eligibility would be improper and inappropriate.

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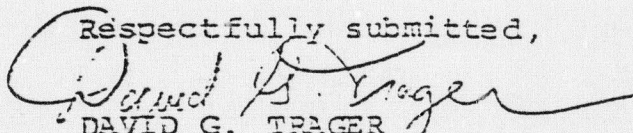
The so-called mandatory "life" sentence which the defendants Zvonko and Julianne Busic are subject is not a "life" sentence at all. Pursuant to Section 4205(a), they will be eligible for parole after serving ten years. Similarly, each of the remaining defendants will be eligible for parole no later than that period, or after a shorter period, if a sentence of less than thirty years is imposed.

We believe that release of any of these defendants prior to the serving of at least the minimum period generally provided would be wholly inappropriate considering the nature and circumstances of the crime they have committed, involving as it did the death of one person, and the possibility of death and serious injury to dozens more. While it is unlikely, given the guidelines employed by the Board of Parole, that any of the defendants would be released prior to serving the minimum period generally provided, a sentence which authorizes their early release - as early as a day after sentence, will considerably undermine whatever deterrent effect Congress intended by enacting the stringent penalties contained in Section 1472(i)(1). Moreover, such a sentence can hardly suffice to convince the victims of this offense, particularly the family of Police Officer Murray, that justice has truly been done, a consideration which is not insubstantial for a society that seeks to persuade its citizens to abide by the law.

Moreover, although the notion that rehabilitation should be the principal purpose of a prison sentence is now largely discredited, it is apparent from the factors that motivated the commission of this offense, as well as the palpably false testimony that was given by these defendants at trial, that they are the least likely candidates for "rehabilitation".

We believe, in sum, that a minimum of ten years imprisonment for Zvonko and Julianne Busic, which they would be required to serve if a mandatory life sentence is imposed, and a minimum of six years and eight months to ten years imprisonment for the other defendants, depending on the sentence imposed, is certainly neither cruel nor unjust in the circumstances here.

Respectfully submitted,


DAVID G. TRAGER

United States Attorney

cc: All Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

76 CR 602

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANK PESUT,
and MARC VLASIC,

Defendants.

- - - - - X

MEMORANDUM OF LAW ON BEHALF
OF THE UNITED STATES

The offense of air piracy of which these defendants stand convicted is one of the most serious offenses for which a defendant may be convicted. Section 1472(i)(1) of Title 18, of the United States Code provides that:

Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished -

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or imprisonment for life.

The defendants Zvonko Busic and Julianne Busic stand convicted of air piracy resulting in the death of another person and face a mandatory life sentence. The remaining defendants stand convicted of simple air piracy and face a sentence of imprisonment "for not less than twenty years". All of the

defendants, however, claim that the district court has the power to impose a sentence which would permit the Board of Parole to release them the day after they are sentenced for an offense that risked the lives of dozens of passengers and caused the needless death of a brave young New York City Police Officer. We, of course, believe that such a sentence is wholly inappropriate, even if it could legally be imposed, as the accompanying letter of the United States Attorney makes plain. Here we show that there is no legal authority to impose any such sentence.

The Defendants Are Not Eligible For
Early Parole Pursuant to Title 18,
U.S.C. §4205(b)

The issue of the defendants' eligibility for early parole turns on the intent of Congress in enacting 18 U.S.C. §4205(b). We believe that it is plain from the language of Section 4205(b), and its legislative history, that a defendant who is convicted of an offense which carries a mandatory minimum sentence, particularly a mandatory life sentence, is ineligible for parole.

1. Section 4205(b) provides that:

Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year,

3.

may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine."

Although we do not rely solely upon the language of Section 4205(b), we observe that it is inapplicable where Congress has prescribed a mandatory sentence, particularly a mandatory life sentence.

First, the cases in which Section 4205(b) permits early parole eligibility to be conferred by the sentencing judge are those in which he has discretion to determine that "the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year." Here, of course, the sentencing judge has no such discretion. Congress has determined that Zvonko and Julianne Busic be sentenced to life imprisonment, and the remaining defendants be sentenced to imprisonment for not less than twenty years.

Moreover, the very provisions of Section 4205(b) (1) and (b) (2), which set out the two alternative procedures for early parole eligibility, do not by their terms apply to a mandatory life sentence. Section 4205(b) (1) permits the judge to "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become

eligible for parole, which term may be less than but shall not be more than one third of the maximum sentence imposed by the court." Obviously this provision is applicable by its terms only where the defendant has been sentenced to imprisonment for a definite term of years. ^{1/}

Similarly Section 4205(b) (2) provides that the court may "fix the maximum sentence of imprisonment to be served, in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine." This provision, of course, assumes a case in which the sentencing judge has discretion to fix "the maximum sentence of imprisonment to be served", but with respect to Zvonko and Julianne Busic, Congress has fixed at life imprisonment the maximum term of imprisonment to be served, and provided for parole eligibility after ten years. 18 U.S.C. §4205(a).

Accordingly, if all that we had to rely on was the language of Section 4205(b), it would be difficult to justify its application here. There is, however, an explicit statement of Congressional intent that a defendant subject to a mandatory sentence not have the benefit of the early parole

^{1/} There is no such thing as one-third of a life sentence, as Congress recognized in Section 4205(a). There it provided for parole eligibility after a defendant has served one-third of his sentence or after "serving ten years of a life sentence."

eligibility provided for in Section 4205(b). ^{2/}

In 1958 when Congress enacted Section 4205(b), then Section 4208(a), as well as Section 4216, then Section 4209, which deals with eligibility for Youth Correction Act treatment for persons between the ages of twenty-two and twenty-six, the legislation adding these two sections contained the following proviso (Pub. L. 85-752, Section 7):

"This Act does not apply to any offense for which there is provided a mandatory penalty."

Moreover, the legislative history of Section 7 of Pub. L. 85-752, makes plain its applicability here. S. Rep. No. 2013 (1958), 85th Cong., 2 Sess., accompanying H.J. Res. 424 (which became Pub. L. No. 85-752), 2 U.S. Code Cong. & Adm. News, 3891-3892, contained the following statement:

"As set forth under 'Purpose' above, the proposed legislation provides that it shall not apply to any offense for which there is

^{2/} Contrary to the defendants' claim, Section 4205(g), which permits the Bureau of Prisons to apply to the district court for the reduction of any "minimum [parole] term" to time the defendant has served, does not undermine this argument at all. Section 4205(g) obviously refers to those cases in which the sentencing judge has the power, pursuant to Section 4205(b)(1), to fix a "minimum [parole] term."

provided a mandatory penalty. This is to assure that the mandatory penalties provided by statute for special categories of crime, such as armed robbery of a post office, and violations of the Narcotic Control Act of 1926, as amended by the Narcotics Control Act of 1956, shall not be affected in any way by the provisions of the bill" (emphasis added).

Quite plainly this proviso to the legislation which added former Section 4208, now Section 4205, shows that the sentences imposed here are "mandatory" sentences within the ambit of Section 7 of Pub. L. 85-752.

Section 2114 of Title 18, the provision dealing with the armed robbery of a post-office, one of "the special categories of crime" which were cited as illustrative of the mandatory sentences that would not be affected by former Section 4208, now Section 4205, provides merely that an offender "shall be imprisoned twenty-five years." Similarly, while some offenses defined in the Narcotics Control Act contained explicit provisions precluding parole, other provisions merely provided mandatory minimum penalties. See, e.g., United States v. Kleinzahler, 306 F. Supp. 311, 316 (E.D.N.Y. 1969). By contrast, of course, Section 1472(i)(1) provides for a term of imprisonment for "not less than twenty years" and, if death results, life imprisonment. Surely the

proviso to former Section 4208, now Section 4205, is as applicable here as it is to the armed robbery of a post-office, or the first time possessor of marijuana whom Judge Weinstein held in United States v. Kleinzahler, 306 F. Supp. 311 (E.D. N.Y. 1969), would not be eligible for Youth Correction Act treatment because the offense carried a mandatory minimum sentence of two to ten years.

We are aware that the defendant Basic has pressed a number of arguments regarding the applicability of Section 4205(b). We believe that each of them is without substance.

a. The first, and the most insubstantial argument, is that in 1976, in the course of a general revision of Chapter 311 of Title 18, Congress repealed former Chapter 311, of which Section 4208 was a part, and substituted a new Chapter 311, without reenacting the proviso in Section 7 of L. 85-752. Although the critical provisions of former Section 4208(a) were reenacted without change, except for being placed in Section 4205(b), the defendants claim that, the failure of Congress to reenact the Section 7 proviso, reflects an intent on the part of Congress to change prior law and permit early parole eligibility even where a mandatory sentence is imposed.

This argument is frivolous. As Mr. Justice White recently observed in Muniz v. Hoffman, 422 U.S. 467, 470:

"To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable. As this Court said in United States v. Ryder, 110 U.S. 729, 740, 4 S. Ct. 196, 201, 28 L.Ed. 308 (1884): 'It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.'"

Rather than indicating any intention to change prior law, the legislative history of the 1976 revision shows that, in reenacting without change the provisions of former Section 4208(a), Congress did not intend to make any change in prior law or practice. No. 94-369, 94th Cong., 2nd Sess., pp. 22-23, 1976 U.S. Code Cong. & Adm. News, p. 343-344.

b. The defendants also argue that, assuming early parole eligibility may not be authorized where the law requires the imposition of a mandatory sentence, the sentence required to be imposed here is not a mandatory sentence within the meaning of the proviso contained in Section 7 of P.L. 85-752. This argument appears to rest on two separate prongs, both of which we believe are without merit.

First, when Congress originally enacted the air piracy statute in 1961 and provided for a mandatory sentence of not less than twenty-years, if the death sentence was not imposed, the accompanying House Report, H.R. 985, 87th Cong.,

1st Sess., 1961 U.S. Code Cong & Adm. News, 2563, 2568 contained an explanatory note which observed:

"If the death penalty is not imposed, the punishment imposed by the court shall be imprisonment for not less than 20 years.

"Under other provisions of law contained in chapter 311 of Title 18 of the United States Code, relating to parole of Federal prisoners, an individual sentenced to imprisonment for life or for any term of years in excess of 45 becomes eligible for parole after serving 15 years of the sentence imposed. An individual sentenced to a lesser term of years becomes eligible for parole after serving one-third of the sentence imposed. The Federal courts are also given discretion, in the case of sentences to imprisonment for more than 1 year, to specify a minimum term of imprisonment after which a federal prisoner may be eligible for parole. This minimum term may be less than one-third of the sentence imposed, but may not exceed one-third of such sentence [emphasis supplied].

Of course, by its terms, the italicized language has no applicability to a life sentence, since there is no such thing as "one-third" of a life sentence. Moreover, while it is apparent that the author of the italicized portion of House Report No 985 was obviously unaware of the provision contained in Section 7 of P.L. 85-752, which made it plain that the provisions of former Section 4208(1) were not available where a mandatory minimum sentence must be imposed, the statement in the House Report No. 985, without more, cannot be deemed to have altered the effect of Section

7. As Chief Justice Marshall observed long ago, "a mistaken opinion of the legislature concerning the law, does not make law." Postmaster-General of United States v. Early, 25 U.S. (12 Wheat.) 136, 148 (1827).

Second, the defendant argues that a "mandatory" sentence within the meaning of the proviso contained in Section 7 of P.L. No. 85-752, means a sentence for which Congress has explicitly said that parole eligibility is precluded. See United States v. Ortiz, 488 F.2d 596 (C.A. 8, 1969). This authority seems to be wholly inconsistent with the legislative history of Section 7, which we discussed above, and, indeed, would make Section 7 redundant. Obviously an explicit statement in a particular statute that a defendant is not eligible for parole would take precedence over a general parole eligibility statute. Accordingly, it is not surprising that there is substantial authority, including our own Judge Weinstein, rejecting this construction of Section 7. United States v. Kleinzahler, 306 F. Supp. 311, 315-316 (E.D.N.Y. 1969); United States v. Woods, 484 F.2d 127, 139 (C.A. 4, 1973); United States v. Cameron, 351 F.2d 448 (C.A. 7, 1965); United States v. Howard, 449 F.2d 1086, 1092-1093 (C.A.D.C. 1971).

11.

Moreover, again it must be emphasized here that even those cases which have adopted the contrary position do not lend much comfort to the defendant Zvonko and Julianne Busic who face a mandatory life sentence. This is so because those cases were concerned with an anomaly said to be created by 18 U.S.C. §3651 which provides that "[u]pon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court ... may suspend the imposition or execution of sentence and place the defendant on probation." They reasoned that it was "illogical and inconsistent" to hold that a district court could suspend a sentence altogether, but not provide for early release. See, e.g. Jones v. United States, 419 F.2d 593, 598 (C.A. 8, 1969); United States v. Remling, 548 F.2d 1274, 1275 (C.A. 6, 1977).

While we believe with Judge Weinstein that any such anomaly should be resolved by Congress, and not by judicial fiat (United States v. Kleinzahler, 306 F. Supp. at 316), this concern is not present where a life sentence has been imposed, because in such a case Section 3651 does not permit the sentence to be suspended. See United States v. Woods, 484 F.2d 127, 139 (C.A. 4, 1973). Moreover, if this alleged anomaly is to be resolved by judicial construction, it is far more sensible and in accord with Congressional intent, to read

Section 1472(i)(1), which mandates a sentence of "not less than twenty years", and which was enacted after Section 3651, as precluding the suspension of sentence which 18 U.S.C. §3651 generally authorizes.

In short, we submit that none of the defendants are eligible for early parole release. Certainly, there is not a shred of authority to support the proposition that Zvonko and Julianne Busic, who must receive life sentences, qualify for such treatment. ^{3/}

3. The defendants' final claim, that the mandatory life sentence prescribed by Section 1472(i)(1) is unconstitutional, ^{3/} would require little ^{DE} response even if they were really subject to a mandatory "life" sentence. The truth is that, even under our construction of Section 1472(i)(1), the defendants Zvonko and Julianne Busic are eligible for parole after ten years, at the discretion of the Board of Parole (18 U.S.C.

^{3/} The only airpiracy case cited by the defendant Busic, United States v. Ortiz, 488 F.2d 175, 113-179 (C.A. 9, 1973) was a case in which the defendant was sentenced to twenty years in prison. Although this does not appear in the opinion, it was the only sentence (other than death) that could have been imposed under the pre-1974 version of 49 U.S.C., §1472(i)(1). Had the death sentence been imposed, the issue of early parole eligibility would not have come up in the case. Of course, for the reasons outlined above, we believe that, even on its facts United States v. Ortiz was wrongly decided.

§4205(a)). It will take a good deal more in the way of authority than the defendants have cited to sustain the proposition that such a penalty is "cruel and unusual" for the crimes for which they have been convicted.

CONCLUSION

The defendants may not legally receive the benefit of early parole eligibility.

Dated: Brooklyn, New York
July 19, 1977

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

EDWARD R. KORMAN
Chief Assistant U.S. Attorney
(Of Counsel)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JULIENNE BUSIC, ET. AL.

Defendants.

76 CR 602 (JEB)

PRE-SENTENCE
MEMORANDUM

-----X

This memorandum is submitted on behalf of JULIENNE BUSIC to supplement the pre-sentence report prepared by probation officer James Fox and to bring to the Court's attention certain facts which were not elicited during the trial but which are, we feel, relevant to the sentence to be imposed on Mrs. Busic.

We recognize that the Court must impose a sentence of life imprisonment on Count One of the indictment. Under 18 U.S.C. §4205 (a) a prisoner sentenced to life becomes eligible for parole consideration after service of ten years. This general eligibility provision, however, is not mandatory and the Court is given the power to set parole eligibility at a time earlier than ten years pursuant to 18 U.S.C. §4205 (b) (1). Indeed, the Court may if it wishes direct that the prisoner be considered for parole immediately. 18 U.S.C. §4205 (b) (2). The primary focus of this memorandum is, therefore, directed to the issue of parole eligibility for Mrs. Busic. We feel that her background and character, the circumstances under which she participated in the hijacking, and the manner in which she conducted herself aboard the aircraft all militate strongly in favor of setting a parole eligibility date of less than ten years.

In addition, Mrs. Busic was born and raised in Oregon. Her entire family still lives in the Portland area.

In light of that fact, we feel that it would be appropriate for her to serve her sentence at the Federal Women's Correctional Institution located at Terminal Island in Los Angeles, California. This medium security facility is the only Federal institution for women west of Fort Worth, Texas, and does house prisoners serving life sentences. In order to determine the feasibility of such a placement, we contacted Mr. J. Michael Quinlan, who is the Executive Assistant to the Director of the Federal Bureau of Prisons in Washington, D.C. Although Mr. Quinlan recognized the desirability of housing a prisoner near her family and said he would do what he could to effect such a placement, he indicated that the Bureau of Prisons would give great weight to the Court's view on this subject. In fact, he indicated that Mrs. Busic would probably not be sent to Terminal Island unless the sentencing judge recommended that placement. We therefore submit this Memorandum in support of our request that the Court make such a recommendation at the time of sentencing.

Finally, the applicability of the "resulting in death" provision of 49 U.S.C. §1472 (i) to the facts of this case is subject to question and has been vigorously litigated in pre-trial motions. Should the appellate courts agree with our construction of the statute the conviction on Count One would have to be reversed and the Count dismissed. In that event the sentence imposed on Count Two would of course become controlling. The proper scope of that sentence is the third issue to which this memorandum is addressed.

I. BACKGROUND AND CHARACTER

Mrs. Busic was born in a small town on the coast of Oregon in September, 1948. Her parents, both of whose families have lived in Oregon for several generations, moved to the city of Portland when she was fairly young and continue to

to live there at the present time. Her three younger brothers and her grandparents also live in Oregon, as do the vast majority of her other relatives and friends.

During the past ten months, counsel has been in frequent contact with Mrs. Busic's parents and has spoken with many of her friends and acquaintances in Oregon. Her father, who is a professor of Classical Greek at Portland State University, and her mother, who works in the library of the local public school, are both hardworking, honest, intelligent people. From speaking to them and from seeing them interact with their daughter, it is apparent that Mrs. Busic was raised in a close-knit, concerned and warm family atmosphere. She kept in close contact with her parents after she went to college at the University of Oregon in 1966 and even after she was married in May of 1972. There was never any period of rebellion or alienation.

Indeed, although Mrs. Busic attended college in the late 1960's during the height of the anti-war protests, she never joined any political groups or organizations at the university, nor did she participate in demonstrations or marches. She was simply not interested in such politics. The people we spoke with who knew her then described her as a serious, hard-working student who was much more concerned with her education and scholastic achievements than most of her contemporaries. That concern is reflected by the fact that she graduated with honors from both high school and college.

During the time that she was a college student Mrs. Busic held a number of part-time and summer jobs in order to pay for her tuition and living expenses. These jobs provide

some insight into her personality and character. For example, while attending the University of Vienna, in 1967, she also worked as a tutor-governess for an Austrian family. In 1968 and 1969 Mrs. Basic worked as a nurse's aide at the Belmont Convalescent Center in Portland, Oregon, the Seaside Convalescent Centre in Seaside, Oregon, and at a nursing home in Eugene, Oregon. Although she could have gotten jobs that paid more money and offered better working conditions, she chose this type of work for the personal satisfaction she derived from helping people who desperately needed the attention and kindness she showed them. Several of the people we spoke with had vivid memories of Julianne going to the Center on her days off to talk with the patients and take them on outings away from the home. (see, e.g., letter of Joanne Bowyer, Exhibit A-2 attached).

Similarly, when she was living and studying in Austria again in 1970, Mrs. Basic worked for a year as a nurse aide in the eye clinic at the General Hospital in Vienna. We contacted one of the doctors and two of the nurses who worked with her at the hospital. Although more than five years had elapsed, they remembered her as an extremely dedicated and compassionate person who spent many hours of her own free time helping the patients with their rehabilitation and related problems. In fact, they volunteered to come to the United States to testify as character witnesses on Mrs. Basic's behalf.

After graduating from Portland State University in 1975, Mrs. Basic and her husband moved to New York, where she got a job teaching English to Spanish-speaking immigrants at the S.C.S. Business and Technical School. We spent several

hours at the school speaking to the people who knew her there. Each one described her as an unusually dedicated and concerned teacher who always arrived early and stayed late. She truly cared about her students as people and went out of her way to help them - not only with their schoolwork but also with the problems they encountered outside of school, such as finding suitable housing and employment. (See, e.g., letters of Frank Michel, Linda Lewandowski, Steven Sunshine and Gaspar Rodriguez, Exhibits A3-A6 attached).

Many of the other people we contacted who knew Mrs. Busic related instances where she had put others ahead of herself. All of the people we spoke to - her friends and acquaintances, her parent's neighbors, her college professors, her former landlord in New York, and her former employers in Vienna, Portland and New York - expressed utter amazement at her involvement in a hijacking. Again and again she was described as a sensitive, warm, compassionate and gentle person. None could conceive of her approving of violence in any form or for any cause.

Many of these people have written letters on Mrs. Busic's behalf describing their knowledge and opinion of her character and personality. (See Exhibits A1-A2 attached). We respectfully ask the Court to read and consider these letters, which by themselves bear eloquent testimony to the kind of person Julianne Busic is, in conjunction with the letters written by a number of the passengers and crew members who were aboard Flight #355 on September 10th. (See Exhibits B1-B7 attached). Taken together, these letters clearly indicate that

the compassion and concern which she showed throughout the course of the hijacking was her natural and genuine reaction to the situation she was confronted with. In short, her actions on the airplane were dictated not by any conscious plan or design but rather by traits which were deeply rooted in her character and which had been displayed on numerous occasions throughout her adult life.

II. PARTICIPATION IN THE OFFENSE

During the course of her direct testimony, Mrs. Basic admitted that she knew prior to boarding the plane that her husband intended to seize control of it. Although the jury by its verdict has concluded that she is criminally liable for her actions on the plane, the nature and degree of her culpability are, we feel, proper areas for the Court to assess and evaluate in determining the severity of the sentence which should be imposed in her case. In making that important and difficult judgment, we respectfully submit that two of the critical factors to be considered are (a) Julianne Basic's own state of mind when she boarded the aircraft with her husband; and (b) how she conducted herself during the course of the hijacking.

A. State of Mind

In judging Mrs. Basic's state of mind on September 10, 1976, it is important to note at the outset that she was not a political person nor was she personally active in the cause of Croatian Independence. In fact, we specifically asked the people who knew her while she was living in New York whether she discussed her own feelings about the political situation in Yugoslavia. Their unanimous response was that she did not seem to enjoy discussing politics and

would generally talk about Croatia only when asked specific questions about the situation there. Even then her responses were never in the form of political rhetoric.

Neither did she belong to or do any work for any of the Croatian organizations which her husband was so active in. Indeed he made a conscious effort to keep her in the dark regarding the membership and activities of many of these groups. It is, we submit, reasonable to conclude that Julianne Busic would never have been aboard T.W.A. Flight 355 on September 10th were it not for the fact that she was married to Zvonko Busic. But that fact alone is not sufficient to explain her presence because it does not take into account either the nature of their relationship or the particular circumstances which existed on that day.

As to the former, it is important to realize that when she decided to marry Zvonko Busic in May, 1972, Julianne Schultz committed herself to a life that was very different from the life she had previously led. Since they had little money she had to adapt to a relatively sparse lifestyle, without many of the comforts she was used to. Her husband's primary concern was his country, not himself or even his wife. His political activity dictated to a substantial extent where and how they lived. As a result of that activity they moved much more frequently than most people. She therefore found it extremely difficult to make new friends and to maintain contact with old ones. He was frequently gone on political trips for days at a time, and she often did not know where he was going, who he was meeting with, or when he would be back. Friends of his were attacked and a number were killed. They themselves were shot at on two occasions in Germany, and on one occasion he came home

beaten up. As a result she was often concerned with his safety while he was gone on these trips. Although some relationships might be destroyed by such pressures, the net effect on their relationship was to make her more dependent on him.

In addition, the medical records which we were precluded from introducing into evidence show that Mrs. Busic had been trying to have a child from March, 1976 on. [See Exhibit C attached). A previous pregnancy had ended in a miscarriage in 1974. The records which we did introduce show that in September she believed that she was in fact pregnant and had made an appointment for a gynecological examination. This belief naturally intensified the emotional attachment she felt to her husband and made separation from him at that point an impossible option. It created enormous psychological pressure on her to be with him despite the fact that she was opposed to what he planned to do.

While such pressure may not constitute a legal excuse or justification for Mrs. Busic's decision to get on board the airplane, it does serve to explain how a non-violent, compassionate young woman found herself in the middle of a hijacking. Moreover, it shows that she was motivated not by any criminal or vicious or evil state of mind but rather by emotional needs and a fear of being separated, perhaps permanently, from her husband.

B. Conduct on Aircraft

During the course of his probation report, Mr. Fox repeatedly refers to Mrs. Busic as a "makeshift stewardess" whose "job" was to make sure that the passengers remained calm. He implies that this was done according to a preconceived plan and merely represented her contribution to the hijacking.

This, of course, was the theory adopted by the prosecution during the trial. It is not supported by the facts and was contradicted by a vast majority of the passengers we interviewed.

According to the testimony elicited during the trial, Mrs. Busic was sitting in her seat in the coach section when the steward, Tom VanDorn, acting at the direction of Zvonko Busic, asked her to come up to the cockpit. For the next 27 hours, until she left the plane in Paris in an attempt to bring the hijacking to an end, Julianne Busic did what any sensitive and compassionate person caught in such a situation would have done. She talked to the passengers and tried to answer their questions about her husband and the reasons he had for taking such a drastic step. When she could not personally answer some of the questions she offered the passengers copies of the leaflets her husband had printed. She had personal conversations with a number of the passengers regarding their respective families and background. During the selection process at Gander, Newfoundland, she interceded on behalf of several passengers and convinced her husband that they should be allowed off the plane. (See, e.g., letter of John Gray, Exhibit 3-12 attached). She helped the stewardess bring the passengers food and drink as well as pillows and blankets. She, along with the members of the T.W.A. crew, attempted to reassure the passengers throughout the flight. Indeed, during one of our interviews with Basia Reeves, the senior stewardess on the flight, Mr. Reeves indicated that Mrs. Busic never tried to usurp her stewardess functions but rather would work with the crew, politely and cooperatively, in meeting the passengers' needs and making them as comfortable as possible.

During the entire course of the hijacking, Julianne Busic never once touched any of the pot bombs, lost her temper at a passenger, or threatened anyone in any way. When Marc Vlasic began threatening the passengers who were huddled around him on the plane, Mrs. Busic got into a heated argument with him regarding his actions in the presence of several passengers, who later related this incident to us in their interviews. When her husband began to feel that Captain Carey had been deceiving him, Mrs. Busic argued that the captain was honestly doing everything he could and had, in fact, been truthful. When her husband mentioned that he wanted to have the aircraft take-off from Paris to drop leaflets over Croatia, she argued that Yugoslavia might attempt to interfere with the flight of the plane and she pleaded with him not to subject the passengers to this risk. When the passengers began making suggestions regarding how Zvonko might obtain confirmation that his demands had been met, it was Mrs. Busic who communicated these ideas to her husband and urged him to consider them. (See, e.g., letter of Jacques Dulin, Exhibit B-1 attached). Indeed, one of the passengers, Bishop Edward O'Rourke, told us in an interview that he heard Captain Carey urging Mr. Busic to allow a delegation off the plane to get the confirmation. When Mr. Busic refused, he overheard Mrs. Busic urging her husband, in German, to go along with the Captain's suggestion. At one point the crew was able to pick up a BBC broadcast about the leaflet distribution on the ship's radio. According to Sasia Reeves, it was Julianne Busic who urged Zvonko to listen to the broadcast as a method of confirmation.

Ultimately, Mrs. Busic convinced her husband to allow her to get off the plane with the co-pilot, Lou Senatore, and a passenger, Bill Knudsen, to attempt to obtain

the confirmation via telephone calls to the United States. Both Senatore and Knudsen agree that she did everything she possibly could to bring the hijacking to a conclusion. (See letters of Lou Senatore and Bill Knudsen, Exhibits B-6 and B-7 attached). Although she was not able to get absolute confirmation, she nevertheless urged her husband to surrender during several radio conversations with the aircraft. She told him that nothing would be gained by continuing and that the passengers should not be put through any more. After several hours, he finally agreed to give up.

In his report, Mr. Fox concludes that Mrs. Busic fully supported her husband's actions. This conclusion is certainly not consistent with her actions during the week before the hijacking, when she tried on numerous occasions to dissuade him from carrying out his plan. Nor is it consistent with her actions on the plane. On the contrary, they show a young woman trying her best to ameliorate the situation her husband had created and to bring the ordeal to an end as quickly and peacefully as possible. Her personal distaste for the situation she found herself in was reflected in her comments to several of the departing passengers at Gander. As Jeanne Thelwell testified, Mrs. Busic stated that she wished she could get off the plane with them - hardly the comment of a willing and eager participant. Her personal opposition to the whole venture was expressed in a conversation which Bishop O'Rourke related to us in an interview conducted on November 2, 1973. That conversation occurred during the hijacking and concerned the morality of the act. According to the Bishop, Mrs. Busic agreed that the hijacking was not morally justified regardless of the legitimacy of the cause. This open and honest statement clearly

What then, is an appropriate penalty under these circumstances? The statute mandates a sentence of life imprisonment on Count One, and this provides the deterrence which the law is designed to achieve. But neither deterrence nor rehabilitation nor justice requires that Julianne Busic serve a minimum of ten years before becoming eligible for parole consideration. Her background as well as her conduct during the hijacking itself clearly indicate that she will present no realistic danger to others whenever she is released. Nor can it be doubted that she can and will be a productive member of society if given the chance within a reasonable time.

Indeed, it seems that 18 U.S.C. §4205 (b) (1) was specifically designed to apply to a situation where a person is convicted of a crime that is so out of character and inconsistent with the rest of her life that she presents a far better parole risk than one normally convicted of such a crime. It provides the flexibility which justice requires in the anomalous situation presented by the facts here. We therefore respectfully request that the Court set Mrs. Busic's eligibility for parole at a time less than ten years under Counts One and Two.

With regard to the place of imprisonment, there seems to be no sound reason for separating Mrs. Busic from the positive influences which her family can provide while she is incarcerated. We feel that a placement near her family on the West Coast would not only be logical and humane, but also in conformity with established penological principles. We therefore respectfully request that the Court recommend to the Bureau of Prisons that Mrs. Busic be directed to serve her sentence at the Federal Correctional Institution at Terminal Island, California.

Dated: New York, New York
July 6, 1977

DAVID RUDOLF

MICHAEL IRA ASEN
Attorneys for Julianne Busic
217 Broadway
New York, New York 10007
(212) 235 0901

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

RITA BLOOM

being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 29th day of September 1977 she served a copy of the within

APPENDIX

by placing the same in a properly postpaid franked envelope addressed to:

Pierce O'Donnell, Esq.

Williams & Connolly, Esqs.

1000 Hill Building

Washington, D.C. 20006

and deponent further says that she sealed the said envelope and placed the same in the mail chute
225 Cadman Plaza East,
drop for mailing in the United States Court House, ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Rita Bloom

Sworn to before me this

29th day of September 1977

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24/4501966
Qualified in Kings County
Commission Expires March 30, 1979